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No. ~~83535-0~~
(Consolidated cases)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO MILLAN,

Petitioner.

ON APPEAL FROM THE
COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO
AND THE SUPERIOR COURT OF PIERCE COUNTY

PETITIONER MILLAN'S SUPPLEMENTAL BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Petitioner

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. INTRODUCTION.

Over time, both this Court and the U.S. Supreme Court have grappled with the question of how to apply new rulings on constitutional law, a question called the "retroactivity" issue. After trying different theories, both courts ultimately determined that the proper rule should be that such decisions apply to all cases which are still pending on direct review. When the U.S. Supreme Court issued a decision during the pendency of Millan's appeal in which it was held for the first time that the search which happened in Millan's case violated the Fourth Amendment, Millan relied on these rulings and sought to have that holding apply to his case. Rather than doing so, the court of appeals declared that Millan had "waived" the issue by failing to raise it and develop the record on it below.

This novel theory of "preexistence" waiver, deeming an issue waived because the defendant did not raise it even though it did not exist under the law in effect at the relevant time, does not withstand the barest scrutiny of logic or fairness, as other judges on the court of appeals have held. Further, this theory effectively eviscerates the holdings of this Court and the U.S. Supreme Court on the proper application of new rules of constitutional law. It is unsupported by the very caselaw upon which it relies and does not serve the purposes for which that caselaw was established. Instead, the correct way to handle cases such as Millan's is to honor the "retroactivity" rulings of this Court and the U.S. Supreme Court and the fundamental principles underlying those rulings by either ruling on the issue or, if the factual record is incomplete, remanding for further

proceedings at the trial court level in light of the new constitutional principles which apply.

B. ISSUES PRESENTED

1. Should this Court decline to amend the long-standing, well-reasoned law of retroactivity of constitutional law decisions to allow for a theory of "preexistence waiver," so that a defendant can be deemed to have "waived" an issue before that issue exists as a matter of law?

2. Should this Court reject Division Two's theory that a defendant who does not make a motion to suppress which would have been meritless at the time of trial under then-existing law is precluded from the benefits of caselaw handed down while his case is still on direct appeal?

C. SUPPLEMENTAL STATEMENT OF THE CASE

1. Procedural facts

Petitioner Francisco Millan was charged with, *inter alia*, unlawful possession of a firearm. CP 1-2; RCW 9.41.040; RCW 9.41.030. He was found guilty after a jury trial and a standard range sentence was imposed. CP 63-74; 88-100. He appealed and, on August 7, 2009, Division Two of the court of appeals issued a part-published decision with three opinions: a decision, a concurrence and a concurrence/dissent. CP 63-74; State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009). This Court granted review and this pleading follows.

2. Facts relevant to issues

Millan was charged with possessing a gun which was found on the floorboard behind the driver's seat of the car he was driving. RP 91-92.

The car was searched after it was pulled over based upon a report of a "disturbance" in the car and Millan was placed in the back of a police car because he was yelling at his wife and there had been allegations that he and his wife had been involved in an argument. RP 107-108. An officer had not seen the gun when he approached the car after the stop but claimed it was in "plain view" when he started the search. RP 91-101.

Millan did not file a motion to suppress but, after his appeal was filed, the U.S. Supreme Court issued its decision in Arizona v. Gant, __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), holding that it is a violation of the Fourth Amendment for officers to search a car "incident to arrest" when the person arrested is no longer within reach of the car and officers have no reasonable belief the car contains evidence of the relevant offense. Millan then filed a supplemental brief, arguing that Gant applied to his case under the rulings of this Court and the U.S. Supreme Court on "retroactivity" of such decisions, and that Gant compelled reversal. Supplemental Brief of Appellant ("SBOA") at 1-10.

On August 7, 2009, Division Two affirmed in a decision made up of three published opinions. State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009), review granted, ___ Wn.2d ___ (2010). In the first opinion, Judge Quinn-Brintnall declared that, while Gant clearly applied to the case, Millan had "waived" his right to raise the issue by not raising it at trial but, at the same time, that counsel could not be ineffective for failing to predict the change in the law. Millan, 151 Wn. App. at 501-503. In an opinion concurring with the result, Judge Bridgewater said that he agreed with the "waiver" theory and also felt the record was insufficient to

determine if the search was illegal. 151 Wn. App. at 503. Judge Hunt concurred with the result and most of the majority's analysis but felt it was "dicta" to declare that Gant applied because "[w]e ultimately decide that Gant does not apply in Millan's case." Millan, 151 Wn. App. at 504.

After the Petition was filed, other judges on the court of appeals, Division Two, rejected the "waiver" theory, holding that it effectively amounted to denying Millan the benefit of Gant and depended on reasoning contrary to established law. State v. McCormick, 152 Wn. App. 536, 216 P.3d 475 (2009). Another panel issued a decision in which they held that the decision in Millan was "simply unfair" and a contradiction of this Court's binding precedent on retroactivity. State v. Harris, 154 Wn. App. 87, 224 P.3d 830 (2010). Millan filed a supplemental petition based upon those cases, also noting that the same judges who had decided Millan had indicated an intent to follow that decision. Supplemental Argument in Support of Petition for Review ("SP") at 1-8. Subsequent decisions have indicated the same. See State v. Nyegaard, ___ Wn. App. ___, ___ P.3d ___ (2010 WL 610764) (February 22, 2010).

D. SUPPLEMENTAL ARGUMENT

1. "RETROACTIVITY" LAW SET FORTH BY THIS COURT AND THE U.S. SUPREME COURT IS BASED UPON SOUND REASONING WHICH IS OFFENDED BY THE COURT OF APPEALS DECISION DENYING MILLAN THE BENEFIT OF THE HOLDING OF GANT

The constitution is a living document, subject to interpretations which may change. See, e.g., White v. Crook, 251 F. Supp. 401, 408 (D.C. Ala. 1966). The U.S. Supreme Court has dealt with the issue of such changes, examining whether new interpretations of constitutional

mandates should be applied only prospectively or should be applicable to cases pending on review, a practice it called "retroactivity." In Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), overruled by Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the Court decided to craft a retroactivity rule which it felt would take all the competing considerations of such application into account. Under that rule, a court facing the question examined 1) the purpose of the new rule, 2) the extent to which law enforcement had relied on the old rule and 3) how retroactive application of the new rule would affect the administration of justice. Stovall, 388 U.S. at 297.

Applying those factors, the Court held that it would not retroactively apply a rule excluding evidence obtained through an unreasonable search and seizure. Linkletter v. Walker, 381 U.S. 618, 637-39, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), overruled by Griffith, supra. In addition, the Court applied the factors and held that new rules of law which amounted to a "clear break" from previous law would not be applied retroactively. See U.S. v. Johnson, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), overruled by Griffith, supra.

But discontent arose among the justices about the unfairness of its approach. Just a few years after the Stovall rule was announced, Justice Harlan issued an impassioned dissent on the issue, noting that he could no longer "remain content with the doctrinal confusion that has characterized" the application of the three-part "rule." Desist v. U.S., 394 U.S. 244, 256, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J., dissenting), overruled by Griffith, supra. "Matters of basic principle are at

stake," he said, and the three-part rule is "unsound." 394 U.S. at 258-59. Put simply, Harlan argued:

> We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

394 U.S. at 258-59.

Finally, in United States v. Johnson, supra, "the Court shifted course" from the three-part balancing test, based on the inequities it had wrought. After reviewing the history of retroactivity of criminal law rulings, the Court adopted Harlan's view that retroactivity law "must be rethought." 457 U.S. at 548, quoting, Desist, 394 U.S. at 258 (Harlan, J., dissenting). The Johnson Court noted that various justices had, since Linkletter, rejected the idea that defendants whose cases were still pending on direct appeal at the time of the decision should be deprived of the benefit of the new rule. Johnson, 457 U.S. at 545. And the Court noted that the balance of the three-part test "inevitably has shifted from case to case," creating a hodgepodge of rulings that was incredibly difficult to follow and apply. Id.

Justice Harlan had it right, the Court found, when he declared that failing to apply a newly-declared constitutional rule "at least to cases pending on direct review at the time of the decision violated three norms of constitutional adjudication:" 1) "principled decisionmaking," 2) judicial integrity and 3) treating similarly situated defendants similarly.

457 U.S. at 545-46. In reaching its decision to apply new law "retroactively" to cases pending on direct review, the Johnson Court relied on these norms, finding 1) that it would serve the interests of principled decisionmaking to have constitutional decisions mean what they said and apply to all cases on direct review at the time they were issued, 2) that it would satisfy the Court's judicial responsibilities to resolve cases before it "in light of our best understanding of governing constitutional principles," and 3) that it would further the goal of treating similarly situated defendants similarly to apply criminal rulings to all cases still pending on review, regardless whether the police had a reason to know the law would change at some point regarding their conduct:

> **The Government contends that respondent may not invoke [the new case] Payton because he was arrested before Payton was decided. Yet it goes without saying that Theodore Payton was also arrested before Payton was decided, and he received the benefit of the rule in his case.** . . . An approach that resolved all nonfinal convictions under the same rule of law would lessen the possibility that this Court might mete out different constitutional protection to defendants simultaneously subjected to identical police conduct.

457 U.S. at 555-56 (emphasis added) (citations omitted).

Then, in Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), the Court again "agreed with Justice Harlan that 'failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.'" Teague v. Lane, 489 U.S. 288, 304, 109 S. Ct. 1060, 103 L.Ed. 2d 334 (1989) (O'Connor, J.). The Griffith Court finally sounded the death knell for the three-part rule, quoting with approval from another of Harlan's dissents on the topic:

> [A]fter we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. Justice Harlan observed: "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." **As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that prevents us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow unaffected by that new rule."**

Griffith, 479 U.S. at 322-23 (emphasis added), quoting Mackey v. United States, 401 U.S. 667, 675, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1971) (Harlan, J., concurring) and Johnson, supra.

Thus, the U.S. Supreme Court considered, applied and ultimately rejected a test of retroactivity which involved considerations such as "unfairness" to police, "reliance" on the old law by the government, and the potential effect on "administration of justice." Such considerations, part of the analysis under the old three-part rule, had led to inequities and violation of the fundamentals of principled decisionmaking, constitutional integrity and fairness to criminal defendants. As a result, the Court adopted a "bright line" rule, requiring application of new constitutional decisions by the Court to all cases pending on direct review, even if the new caselaw is a "break" from previous law.

This Court followed suit. In In re St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992), this Court noted the "erratic development" of

retroactivity law in the federal courts, pointing out its own efforts to "stay in step" with that development. 118 Wn.2d at 324. It then adopted the rejection of the three-part approach, following the mandates of Griffith and applying new constitutional principles to the case, which was not yet final on review. St. Pierre, 118 Wn.2d at 327. It has continued to do so. See In re Van Delft, 158 Wn.2d 731, 737, 147 P.3d 573 (2006); State v. Hanson, 151 Wn.2d 783, 785, 91 P.3d 888 (2004); State v. Jackson, 124 Wn.2d 359, 361-62, 878 P.2d 452 (1994); State v. Summers, 120 Wn.2d 801, 846 P.2d 490 (1993). Further, it has specifically noted the importance of the "principle of treating similarly situated defendants the same" and that this principle "requires that we allow all defendants whose cases are not yet final to benefit from the application of the new rule." Jackson, 124 Wn.2d at 361-62.

Indeed, this Court has followed the retroactivity analysis of Griffith and St. Pierre even in the face of very strong public policy considerations raised by the prosecution that purely prospective application will honor the government's "reasonable reliance" on the old rule and give sufficient "notice" of the new rule. See Hanson, 151 Wn.2d at 791.

Thus, the law of retroactivity clearly requires application of the holding of Gant to Mr. Millan's case, regardless whether that ruling is a "clear break" with previous law.

In deciding the case, Division Two engaged in the fiction that is was agreeing with the concession of the state that Gant applied and complying with the mandates of Griffith and St. Pierre. Millan, 151 Wn.

App. at 496. "We agree with the parties that Gant applies," Judge Quinn-Brintnall declared, but "[w]e disagree" with the "effect" of Gant on Millan's case. Millan, 151 Wn. App. at 496. The court then went on to hold that Mr. Millan could not benefit from the holding of Gant because he had "waived the right" to raise the issues created by Gant "by failing to file a motion to suppress challenging the legality of the search" below. Millan, 151 Wn. App. at 500-501.

Thus, while the court of appeals recognized that Millan was legally entitled to have Gant apply to his case, it refused to do so. Couching this denial of application of Gant in a theory of "waiver," the court of appeals effectively rewrote the "bright line" of St. Pierre and Griffith. Now, under Millan, the defendant is not entitled to have new law apply even while his case is on direct review unless he somehow predicts the future change in the law and raises a meritless issue at trial in anticipation of such a change, so that he is not deemed to have "waived" it later. Millan, 151 Wn. App. at 500-501.

None of this Court's cases, however, have so held. See, Hanson, 151 Wn.2d at 791; Jackson, 124 Wn.2d at 361-62. Further, it is inconsistent with Griffith and St. Pierre to so erode the bright line rule of retroactivity into something more akin to the three-part rule, examining the relevant facts and policy considerations to decide who "deserves" relief under the new law. Other panels of the court of appeals have recognized that the decision in this case was not, in fact, an application of Gant but instead a refusal to apply Gant which was "simply unfair, and a contradiction of the Supreme Court's retroactivity rule." Harris, 154 Wn.

App. at 88-90; see McCormick, 152 Wn. App. at 476-77. As the Harris Court declared, "the reasoning in Millan is contrary to established law" on retroactivity, which is premised in "basic fairness" and treating all defendants whose appeals are pending the same "following a change in the law." 152 Wn. App. at 88-90

Notably, at the same time that it required Millan, an indigent defendant, to have raised a meritless issue below on the off chance that it somehow became less so due to a change in the law on appeal, the Millan panel of Division Two also refused to hold counsel to this impossible standard. Counsel could not be ineffective, the panel declared, because "pre-Gant case law indicated that the seizure was valid under the search incident to a lawful arrest warrant exception" and counsel cannot be expected to "anticipate changes in the law." 151 Wn. App. at 502-503. In its haste to find a reason to fail to apply Gant to Mr. Millan's case, therefore, the panel engaged in the kind of circular logic which creates disrespect for our legal system: holding an indigent defendant to a higher standard than that with which his trained, experienced counsel would be tasked.

Because the decision in Millan is inconsistent with the mandates of St.Pierre and Griffith and the bright line law on retroactivity, it should be reversed.

2. A DEFENDANT CANNOT BE DEEMED TO HAVE WAIVED AN ISSUE WHICH DOES NOT EXIST AT THE RELEVANT TIME AND TO HOLD OTHERWISE WOULD LEAD TO ABSURD, INEQUITABLE RESULTS AND SERIOUS WASTE OF SCARCE RESOURCES

The panel's decision in this case also fails because its declarations

regarding "waiver" offend basic principles of logic, fairness, the law and judicial economy. Under Division Two's holding in this case, a person is deemed to have waived every possible issue which might someday exist if the law changes, unless those issues are raised at trial.

This theory of "preexistence waiver," mandating that a person is deemed to have waived arguments which do not even exist at the relevant time, cannot withstand review.

First, it is against basic logic to state that a person can waive an issue by failing to raise it *before it even exists*. A waiver is the intentional "relinquishment or abandonment of a *known* right or privilege." State v. Edwards, 93 Wn.2d 162, 168, 606 P.2d 1224 (1980) (emphasis added). Further, the policy reason behind the general rule of declining to address issues raised for the first time on appeal is that "[t]he appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The requirement of raising an issue at the lower court is intended to allow the trial court the chance to correct or address the error and thereby avoid the expense of appeals and retrials. Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 251 (1983).

Thus, it makes sense to require a defendant to waive issues which exist and could be raised at the trial court level or be deemed to have waived them in all but limited circumstances. Holding them to this standard furthers the goal of judicial economy and helps ensure that criminal defendants do not fail to raise a known issue in order to "game"

the system.

Here, however, there is no way that Millan could have known that the Gant decision would effectively overrule 20+ years of precedent at some point in the future. As the court of appeals itself admitted, at the time of his trial the law was such that a challenge to the search and seizure would have failed, because such a search was deemed "valid." Millan, 151 Wn. App. at 503. He could not engage in a "waiver" of the Gant issue because it did not exist. And the policies behind enforcing theories of "waiver" are inapplicable. Millan could not have been trying to "game" the system by holding back the issue which, again, did not yet exist as a matter of law.

In addition, none of the cases upon which the court of appeals panel relied for application of "waiver" support denying Millan the benefit of the full application of Gant to his case. The court cited both federal and state cases as establishing "the general rule that a criminal defendant must preserve an error at trial to raise the issue on appeal." Millan, 151 Wn. App. at 498-99. And Millan does not dispute that such a rule exists.

That rule does not, however, apply to the situation where, as here, the relevant law changes while the case is on appeal. And the cases upon which the court of appeals relied nicely illustrate this point, because every one of them involves the very different circumstance where a defendant knew or should have known of the relevant facts and law at the time of trial and failed to raise the relevant issue until their case was on appeal. See e.g., Puckett v. United States, __ U.S. ___, 129 S. Ct. 1423, 1428, 173

L. Ed. 2d 266 (2009) (where the defendant knew of the alleged violation of a plea agreement by the government and "clearly" had the opportunity to raise that issue below, it would not be addressed for the first time on appeal); United States v. Alcaraz-Arellano, 441 F.3d 1252, 1260 (10th Cir. 2006) (the defendant did not argue that his consent was involuntary below; no new law or facts to justify raising it on appeal); United States v. Lockett, 406 F.3d 207, 212 (3rd Cir. 2005) (the defendant had the opportunity to raise the issue below and did not; no new law or facts); United States v. Luciano, 329 F.3d 1, 8-9 (1st Cir. 2004) (the defendant did not raise the issue below; no new facts or law); United States v. Childs, 944 F.2d 491, 495 (9th Cir. 1991) (defendant did not protest the search of his houseboat below so could not raise it on appeal); United States v. Crismon, 905 F.2d 966, 969 (6th Cir. 1990) (the defendant's "factual basis" for making an objection existed at the time of trial and they failed to raise is so could not raise it on appeal); see also, State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995) (where the defendant failed to raise a motion to suppress below he could not raise the issue on appeal; no new law involved); State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539, cert. denied, 389 U.S. 871 (1967) (where the defendant failed to raise an objection to evidence of a stolen television being admitted at trial he could not raise that issue on appeal); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966) (because the defendant did not move to suppress the evidence until after trial had begun, he had not properly raised the issue); see Millan, 151 Wn. App. at 498-501 (citing these cases).

In all of these cases, the defendant *could have* raised the issue in

question below or at the relevant time, because he or she had both the factual and the legal basis to do so or became aware of that basis while the case was pending below. See, e.g., United States v. Walls, 225 F.3d 858, 861-62 (7th Cir. 2000) (the defendant claimed he was unaware of the relevant facts until trial but then failed to raise the relevant issue when the facts became known or post-trial, and was thus deemed to have forfeited it).

Indeed, in Baxter, this Court specifically noted the relationship between the requirement of raising an issue and having knowledge of its existence, declaring that, because "[a]ppellant here was fully aware of the circumstances surrounding his arrest by the time the allegedly seized items were offered into evidence," he could have raised the issue but "chose to remain silent." 68 Wn.2d at 424.

Thus, the cases upon which Division Two relied in this case illustrate that it is only when the defendant is "fully aware" of the existence of the issue below that he will be deemed to have "waived" it by not raising it until the case is on appeal.

The federal analogy suffers from several other defects, as well. The federal rule in question, Federal Rule of Criminal Procedure 12, specifically provides that "[a] party waives and Rule 12(b)(3) defense, objection or request not raised by the deadline" set by the trial court. Fed. R. Crim. P. 12(b)(e). And 12(b)(3) issues include "a motion to suppress evidence." Fed. R. Crim. P. 12(b)(3)(C). Further, it is within the discretion of a court to address such issues on appeal for the first time, because the court may "for good cause . . grant relief from the waiver."

Fed. R. Crim. P. 12(b)(3)(e). Rather than mandating that all issues be raised or be waived, the relevant rule permits such issues to be raised later if there is good cause to do so. See United States v. Lampton, 158 F.3d 251, 258-59 (5th Cir. 1998), cert. denied, 525 U.S. 1183 (1999) (noting that the defendant failed to argue such cause for raising an issue for the first time on appeal). As the 9th Circuit has recently noted, "[w]hile issues not raised in the district court normally are deemed waived," newly presented issues may be addressed if "the new issue arises while the appeal is pending because of a change in the law." United States v. Flores-Montano, 424 F.3d 1044 (9th Cir. 2005), quoting, United States v. Robertson, 52 F.3d 789, 791 (9th Cir. 1994) (quotations omitted).

Indeed, the U.S. Supreme Court has rejected the idea that a defendant cannot raise an error under the federal "plain error" standard if the error was not objected to below even though it did not yet exist as a matter of law:

> The Government contends that for an error to be "plain," it must have been so both at the time of trial and at the time of appellate consideration. In this case, it says, petitioner should have objected to the court's deciding the issue [below]. . . even though near-uniform precedent from both this Court and from the Court of Appeals held that course proper. Petitioner, on the other hand, urges that such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point[.]

Johnson v. United States, 520 U.S. 461, 468, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997). It was sufficient, the Court held, if "by the time of appellate consideration, the law had changed." Id.

In any event, this Court has already rejected the idea that a

defendant who fails to move to suppress prior to trial is always precluded from raising the issue later if it is warranted. In State v. Gunkel, 188 Wash. 528, 63 P.2d 376 (1936), the Court specifically recognized an exception for failing to raise a suppression hearing before trial, applicable when, "by the exercise of due diligence" the defendants "could not have learned that the articles had been unlawfully seized" before trial. 188 Wn.2d at 536. In such circumstances, this Court held, it is required that the issue of suppression be ruled on when it was revealed - in that case, at trial. 188 Wn.2d at 536.

While Gunkel did not involve the situation present here, State v. Rodriguez, 65 Wn. App. 409, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992), did. In Rodriguez, the trial attorney made a motion to suppress but withdrew it prior to any hearing on the issue because of the controlling caselaw at the time. 65 Wn. App. at 417. After trial, this Court ruled the same type of search unconstitutional. Id. On appeal, Rodriguez cited this Court's decision and asked for reversal. Id.

In response, the prosecution raised the same claim as the one adopted in this case - that "the defendant expressly waived his right to challenge the admission of the evidence" by withdrawing his motion to suppress and not holding suppression proceedings below. Id. The Rodriguez Court disagreed. Under Griffith and its Washington state progeny, the court held, the new caselaw applied to the case even though it was on appeal. Rodriguez, 65 Wn. App. at 417.

Further, the Rodriguez Court rejected as illogical the same "waiver" theory that the panel accepted here. Put simply, the Rodriguez

Court held, "there was no waiver of this constitutional right" because "at the time of trial, the parties and the court would reasonably have relied" on the existing law that the search was proper. 65 Wn. App. at 417.

In distinguishing Rodriguez, the panel in this case focused on the fact that Rodriguez had previously moved to suppress the evidence but withdrawn the motion. Millan, 151 Wn. App. at 499-500. The problem with that "distinction" is that it is without difference. If indeed the reason that the panel was holding Millan to the "waiver" was because failing to raise the issue failed to give the trial court the opportunity to address it and because the result was an insufficient record upon which to decide the issue, Rodriguez suffered from the same problems. Because he withdrew the suppression motion before any hearing on it could occur, the trial court in Rodriguez did not have the opportunity to rule on the motion, nor did the state have the opportunity to develop a record. Rodriguez, 65 Wn. App. at 417. Yet that case applied the retroactivity principle, as required, despite those alleged "failures."

Notably, the panels' concern that the record was not sufficiently developed did not mandate dismissal of Millan's Gant claim. It could have done what it did in another case - remand for further proceedings on the issue. See State v. Bliss, 153 Wn. App. 197, 222 P.3d 107 (2009). In Bliss, the court addressed the issue only because a motion to suppress had been made but, "[t]hrough no fault of the parties or the trial court," the issues relevant to suppression after Gant had not been litigated, as Gant had not yet been decided. 153 Wn. App. at 208. Because of that, in fairness to the parties, the court retained jurisdiction but remanded to

allow development of the record on the issue, to see if the motion to suppress could be upheld on different grounds. Id.

If the court's concern in this case was that there was some unfairness in applying Gant as required under St. Pierre and Griffith, it had the option of ordering remand for further development of the record on the issue. Just as in Bliss, it was through no fault of Millan's own that he did not raise the then-meritless issue of suppression, prior to Gant.

In sum, the policies and concepts behind "waiver" simply do not apply where, as here, the relevant issue did not *exist* at the time of trial. When Millan's case was tried, the trial court was bound by this Court's decision in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), overruled by State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), interpreting the Fourth Amendment as holding that a search of a passenger compartment of a car incident to the arrest of a recent occupant was constitutionally permissible under the state and federal constitutions. Just as counsel could not be faulted for failing to have a crystal ball in which to look to discern that Gant would be decided at some point in the future, Millan could not have known this legal change would occur. To hold otherwise, as the panel did here, and to apply a theory of "preexistence waiver," runs afoul of logic, fairness, the purposes behind "waiver" theory and the law of retroactivity.

Finally, the "preexistence waiver" theory of the panel in this case must fail because of its significant negative effect on the standards for ineffective assistance and the resulting drain that effect will necessarily have on scarce criminal justice resources. Before Millan, it was clear that

counsel could not be found ineffective for failing to raise an issue at trial if the law at that time did not support it. See In re Personal Restraint of Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998). Put simply, counsel could not be "faulted for failing to anticipate" that the law would change, nor was counsel required to raise every conceivable issue which might someday become relevant. Id; see also, In re Nichols, 151 Wn. App. 262, 211 P.3d 462 (2009) (at the time of the trial, "no case" had addressed the issue" later decided in the petitioner's favor; rejecting the idea that "trial and appellate counsel should have spotted" it and raise it because that failure was not against "reasonable professional norms).

Under Millan, however, those holdings are in serious question. If the defendant is required to raise every possible issue in order to avoid being deemed to have waived it if it later becomes viable, as Millan holds, counsel thus is on notice of the need to raise those issues. Should counsel fail to do so, he or she will have knowingly failed to protect the client's interests and rights and thus caused the client prejudice. Such a failure would surely amount to ineffective assistance. As a result, trial counsel will have to raise all possible, potential issues just in case the law changes, in order to avoid being ineffective by unintentionally waiving the client's future rights. The U.S. Supreme Court has recognized this very risk, noting that requiring a defendant to raise issues which existing law does not support in order to avoid future claims of "waiver" "would result in counsel's inevitably making a long, virtually useless laundry list of objections to rulings that were plainly supported by existing precedent." Johnson, 520 U.S. at 468. This will cause a serious drain on already

overstretched criminal justice resources. Further, trial courts will be in the untenable position of having to sort through all of the claims thus made in an effort to ensure that valid claims are properly considered and heard.

The doctrine of "preexistence waiver" crafted by the panel of Division Two in this case is unsupported by logic, fairness, principles of judicial and criminal justice economy and the law. This Court should so hold.

3. THE POLICY CONSIDERATIONS THE PROSECUTION CITED BELOW CONFLICT WITH AND WERE ALREADY REJECTED IN THE DEVELOPMENT OF RETROACTIVITY LAW AND "GOOD FAITH" SHOULD BE REJECTED

It is anticipated that, as it did below, the prosecution will argue that the Court should apply a "good faith" exception to the retroactivity rule based upon policy considerations, and thus refuse to grant Millan the benefit of the holding of Gant. Any such efforts should be summarily rejected. The "good faith" exception applies only when an officer, in good faith, has relied on a document such as a warrant which allows his action. See United States v. Buford, __ F. Supp. __, 2009 WL 1635780 (M.D. Tenn.) (June 11, 2009). But that exception has *never* been extended to "reliance on decisions of the United States Supreme Court that were reversed or overturned while the defendant's case was on review." Id.

Nor should it. As the Buford Court noted, "the Supreme Court has not indicated that the good faith exception should be extended into the realm of Supreme Court jurisprudence and the general area protected by

the 'retroactivity doctrine'" of Griffith. Buford, ___ F. Supp. __ (slip op. at 3). To so extend "good faith" would "lead to perverse results," wherein Gant himself would not have been entitled to relief, as the officers who arrested him would have been relying in "good faith" on the previous law. Id. Indeed, anyone who was arrested pre-Gant would likewise be given only the "hollow relief" of being told his rights had been violated but that he had no remedy and the government could exploit that violation against him. Buford, __ F. Supp. __ (slip op. at 4).

That was not the relief granted in Gant. Nor would the Court likely have failed to apply the good faith exception to the warrant requirement to uphold the search if it had been proper, especially because the reliance of officers on the previous rule was specifically noted in the Gant dissent. Gant, __ U.S. at __; 129 S. Ct. at 1723. Indeed, the Court specifically noted that officers' reliance on a practice later deemed unconstitutional is outweighed by the need to protect the constitutional rights at issue. Id.

As the 9th Circuit recently noted,

> Expanding the good-faith doctrine to permit reliance on case law would take the exception in a new and untenable direction. It would for the first time permit the use of illegally obtained evidence based on the good faith of the officer alone, unchecked by the judgment of either the legislature. . .or the judiciary. It would permit an officer to determine whether she has probable cause to search, and then permit her unilateral determination to excuse suppression even after a court determines the search to have violated the Fourth Amendment.

United States v. Gonzalez, 578 F.3d 1130, 1048 (9th Cir. 2009). "Good faith" reliance on caselaw is much different than good faith reliance on a warrant, because even courts have disagreements about what caselaw

means, the Court noted. Id. Allowing a police officer to determine what the Fourth Amendment caselaw permits "without risking any sanction if they overstep" would grant them untenable power and eviscerate the guarantees of the separation of powers and indeed the constitution. Id.

Further, the policy considerations which support application of "good faith" exceptions to the warrant requirement in certain situations are the same considerations applied and rejected in the development of the law of retroactivity. The "reliance" of the government on the previous law, the lack of improper intent on the part of the officers - these kinds of considerations were all part of the balancing test of Stovall, which ultimately was rejected by Griffith. Any efforts by the prosecution to rely on "good faith" should fail.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 12th day of April, 2010.

Respectfully submitted,

KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

TO: Counsel for co-petitioner; Thomas E. Doyle, via email this date;

TO: Mr. Millan, at his current address.

DATED this 12th day of April, 2010.

KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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